ARKANSAS COURT OF APPEALS

DIVISION I
No. CA08-312

	Opinion Delivered APRIL 8, 2009
M.H., Juvenile APPELLANT	APPEAL FROM THE FRANKLIN COUNTY CIRCUIT COURT,
V.	[NO. JV-2006-52]
	HONORABLE KEN COKER, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant M.H. appeals his adjudication of delinquency by a Franklin County Circuit Court on one count of rape, a Class Y felony, pursuant to Arkansas Code Annotated section 5-14-103. He was sentenced to eighteen months' probation and required to comply with the terms of that probation, as well as to enter, follow all recommendations, make progress, and successfully complete a sexual-offender treatment program. On appeal, appellant argues that the circuit court erred (1) in finding him guilty of the rape charge and adjudicating him delinquent; (2) in excluding his parents from the courtroom; and (3) in allowing the State to offer a statement and associated materials at the disposition hearing after they had been suppressed in the adjudication hearing. We affirm.

Facts

In August 2006, appellant's then four-year-old female cousin accused him of rape. He was fourteen years old when the incident allegedly occurred. A joint investigation was

conducted by state police, child welfare, child protection, and local law enforcement. On August 20, 2006, law enforcement officers requested that appellant's mother bring him to the Franklin County Sheriff's Department. He was then questioned, allegedly without a warrant, without being read his rights, and without a written waiver signed by either appellant or his parents.

A report from an interview conducted on September 12, 2006, by DHS Investigator Deanna G. Lacefield with nurse Stephanie Collins, indicates that the female victim was examined by Dr. Murdock, a physician at Johnson County Regional Hospital, who noted her "exam was normal, there was no injury or discharge." It is undisputed that the State never furnished appellant's counsel with a copy of that medical report, even though it was timely requested on January 3, 2007.

On November 29, 2006, the State filed a petition against appellant alleging that he was delinquent, having committed the offense of rape. On December 6, 2006, he entered a plea of not guilty. He filed a motion to suppress on February 26, 2007, alleging that his rights under the Fourth, Fifth, and Sixth Amendments to the United States Constitution had been violated by law enforcement officers because they failed to obtain a signed waiver of his rights before interrogating him at the sheriff's office. The State responded on March 6, 2007. A series of continuances regarding discovery and witness issues occurred, including the State's inability to produce a written waiver of appellant's rights, the audio tape of appellant's statement to law enforcement officers, and the victim's medical reports, which delayed appellant's adjudication hearing for several months. Appellant's adjudication hearing was held

on June 6, 2007; however, his motion to suppress was not heard because the State was still unable to produce the waiver of appellant's rights, the audio tape of appellant's statement to the police, and the exculpatory evidence in the victim's medical reports showing that the results of the exam were "normal, there was no injury or discharge."

Chester Scrivner and Velma Reichard are the biological grandparents of appellant and also his adoptive parents. The circuit court ordered them to appear at the adjudication hearing, but ordered them out of the courtroom when the witness-exclusion rule was invoked. As a result, neither of them was present with appellant in the courtroom when he confronted the witnesses against him.

The victim, who was five years old at the time of the trial, testified at the adjudication hearing, and on two occasions recanted her accusations against appellant. The circuit court allowed the child's mother to remain with her during questioning despite appellant's objection.

The prosecutor referred to appellant's alleged confession to law enforcement officers during his cross-examination of appellant. Appellant objected due to the State's failure to provide this evidence by the deadline previously imposed by the circuit court. Appellant's objection was sustained; however, the prosecutor subsequently raised the issue of statements made to anyone "except the police or DHS people" that he had any kind of sexual contact. Appellant's counsel objected to the form of the question because it implied that appellant had made such a statement to law enforcement officers. The circuit court stated that the prosecutor was "just trying to avoid running into a problem with that other matter."

Appellant's attorney then appears to have acquiesced on the matter, simply replying "All right, Judge," and the prosecutor's questioning continued without any further objection on the matter.

The circuit court entered a delinquency adjudication order on June 6, 2007, finding him guilty of rape beyond a reasonable doubt. At the sentencing hearing on June 20, 2007, the prosecutor again referred to appellant's alleged confession—that had previously been found to be inadmissible—when questioning appellant's mother. The circuit court allowed the questioning on the basis that it was not an adjudication proceeding and because the questions were relevant as to whether appellant should be returned to her care.

Appellant was represented through the adjudication and initial disposition hearings by a public defender for Franklin County, and no appeal was filed. After multiple disposition orders and review orders had been filed, appellant hired private counsel and filed a motion for belated appeal. On April 3, 2008, our supreme court issued a per curiam denying appellant's motion to enter his private counsel as attorney of record, finding that appellant's trial counsel had not been relieved as counsel. Another per curiam was entered on the same date, remanding the motion for belated appeal to the circuit court for determination on whether appellant informed his public defender of his desire for an appeal within the time period allowed for filing a notice of appeal. The matter was heard on May 21, 2008, and an order was entered on June 23, 2008, finding that he was not advised of his appeal rights. The public defender was relieved as counsel and private counsel was appointed for purposes of filing the appeal. Appellant then filed a notice of appeal on July 3, 2008. This appeal followed.

I. Sufficiency of the Evidence

Although appellant raises this issue as his last point on appeal, double-jeopardy concerns require that we review arguments regarding the sufficiency of the evidence first. *Boldin v. State*, 373 Ark. 295, 297, __ S.W.3d __, __ (2008). The State argues, and we agree, that this issue was not preserved because appellant failed to make a motion to dismiss at the close of the evidence as required by Arkansas Rule of Criminal Procedure 33.1(b),(c) (2008). Rule 33.1 applies to juvenile delinquency proceedings, and the appellant's failure to comply therewith constitutes a waiver of any challenge to the sufficiency of the evidence. *E.g.*, *Jones v. State*, 347 Ark. 409, 64 S.W.3d 728 (2002); *Trammell v. State*, 70 Ark. App. 210, 16 S.W.3d 564 (2000).

II. Exclusion of Appellant's Parents from the Courtroom

Appellant also argues that the circuit court erred in not allowing his parents to remain in the courtroom during the adjudication hearing. At the beginning of the adjudication hearing, the prosecutor invoked the witness-exclusion rule. The judge properly directed everyone who would be testifying as witnesses to leave the courtroom. The State's first witness, Velma Reichard, both the biological grandmother and adoptive mother of appellant, came to the witness stand, at which time the prosecutor told the circuit court that "some people"—whom he did not identify—needed to leave. Ms. Reichard identified her husband and said that he was appellant's adoptive father. An unidentified speaker said, "and I'm, his grandpa." The circuit court directed him to step outside. Appellant did not object or request that he be allowed to stay. At the conclusion of her testimony, Ms. Reichard was likewise

directed to step out into the hallway. Again, there was no objection or request that she be allowed to remain in the courtroom.

Appellant failed to object at the circuit court level to the exclusion of his parents from the courtroom, either on the basis of due process or otherwise. Accordingly, his argument is not preserved for appeal. *See Roston v. State*, 362 Ark. 408, 208 S.W.3d 759 (2005) (holding that this court will not consider issues that were not raised and decided below, even constitutional issues). Even in cases involving the absence of the parents when a juvenile is questioned, our supreme court has held that the juvenile must invoke his right to have them present. *See Conner v. State*, 334 Ark. 457, 982 S.W.2d 655 (1998). Neither appellant nor his attorney ever requested that appellant's parents be allowed to remain in the courtroom. By failing to do so, they failed to preserve the issue for appeal.

III. Statements Regarding Confession and Associated Materials at the Disposition Hearing

Finally, appellant argues that the State improperly referred to a statement he made to law enforcement officers when he was first questioned in regard to the victim's allegations. It is undisputed that the tape-recorded statement he made to law enforcement officers was lost and never provided to him during discovery. Despite lengthy discussion during the preliminary hearing, appellant never made any argument below that the prosecutor had acted unethically or in bad faith, that the State had failed to comply with *Brady v. Maryland*, 373 U.S. 83 (1963), or that the statement was improperly obtained; however, he attempts to do so now for the first time on appeal. This court will not consider issues that were not raised and decided below, even constitutional issues. *See Roston*, *supra*. Accordingly, the only issues

preserved for appeal are whether the State improperly referred to appellant's statement and, regardless, whether appellant suffered any prejudice.

It is clearly set out in the record before us that appellant objected to the reference to his statement during the adjudication hearing, and that the circuit court sustained the objection. Appellant testified on his own behalf at the adjudication hearing. When the prosecutor referred to the statement he made to law enforcement officers, his counsel objected to the prosecutor "going into anything regarding the interviews by [law enforcement officers]." The basis of the objection was that the statement had not been provided in discovery and that cross-examination of appellant concerning the statement, therefore, was not proper. The circuit court sustained the objection, and none of the content of the statement was revealed at that time.

The prosecutor subsequently asked whether appellant had ever told anyone "except the police or DHS people" that he had any kind of sexual contact. Appellant's counsel then objected to the form of the question because it implied that appellant had made such a statement to law enforcement officers. The circuit court stated that the prosecutor was "just trying to avoid running into a problem with that other matter." Appellant's attorney then appears to have acquiesced on the matter, simply replying "All right, Judge," and the prosecutor's questioning continued without any further objection on the matter.

Because appellant received a favorable ruling when he initially objected to the question regarding his statement, there is no issue he can appeal with respect to that ruling. *See Goff v. State*, 341 Ark. 567, 19 S.W.3d 579 (2000). Additionally, when appellant's counsel

objected to the second question, he simply answered "All right, Judge" when the circuit judge explained what he thought the prosecutor was trying to do. The response suggests that he no longer objected—after hearing the circuit court's explanation—and no other objections were made during the course of cross-examination. To the extent that appellant appears to have been satisfied with the circuit court's explanation, he cannot appeal from a ruling with which he agreed. *See Rackley v. State*, 371 Ark. 438, 267 S.W.3d 578 (2007). Moreover, the State points out that he objected only to the form of the question, rather than the subject matter. Accordingly, there was no ruling adverse to appellant during the adjudication hearing with regard to this issue.

Finally, appellant is unable to show prejudice, both because the substance of his statement made to law enforcement officers was never revealed during the adjudication hearing and because the circuit court did not rely on the fact that he had made a statement as a basis for adjudicating him delinquent. Instead, the circuit judge based the ruling on his assessment of the credibility and demeanor of both appellant and the victim. Appellant has the burden of demonstrating prejudice, not merely arguing it. *See Jones v. State*, 374 Ark. 475, __ S.W.3d __ (2008). Accordingly, there is no basis for us to reverse on this issue.

Subsequently, however, the circuit court allowed the State to ask appellant's mother about his statement to law enforcement officers during the disposition hearing. She was explaining how appellant was not the type to hurt little kids and that she would have taken him to counseling if she had seen any signs of such behavior. The prosecutor then asked, "Well, now you did see some signs of this when he confessed to law enforcement, didn't

you?" Appellant's counsel objected on the basis that the question was beyond the scope of the issue before the circuit court, which was to determine if appellant's mother could comply with the circuit court's orders if appellant were returned to her home. The prosecutor responded that Ms. Reichard continued to "turn a blind eye" to what appellant had done despite hearing him confess his guilt to the police, which would be a basis for not placing him back in her home. The circuit court allowed the question because it was not part of the adjudication hearing and the question was relevant as to the parent's belief as to whether the offense occurred. Ms. Reichard then testified that she was in the room when appellant admitted that he had raped the victim, but she believed that he made the admission to protect the victim, and not because he was actually guilty.

Appellant asserts that the circuit court abused its discretion in allowing the questioning regarding inadmissible evidence that was never provided to him during discovery. He maintains that the evidence could have influenced the circuit court to sentence him for the offense based on the inadmissible evidence. He points out that when evidence alleged to have been received in error may have further consequences, such as influencing the fact-finder with respect to the sentence imposed, prejudice may occur. *See Isbell v. State*, 326 Ark. 17, 931 S.W.2d 74 (1996). Appellant asserts that, in his case, prejudice did occur. He then reiterates the multiple discovery requests, court orders, and the State's continued failure to provide the materials, and again attempts to argue prosecutorial misconduct. However, as previously stated, he never raised that particular line of argument at the circuit court level, and we will not consider it now. *See Roston*, *supra*.

We hold that appellant has failed to demonstrate the required prejudice because the record supports that the circuit court did not rely on this portion of Ms. Reichard's testimony in making its disposition decision. The circuit court relied on other evidence, including the evidence that (1) there were other children present in Ms. Reichard's home; (2) Ms. Reichard and her husband were having marital difficulties that included a domestic disturbance to which the police were called; and (3) Ms. Reichard and her husband were seeking a divorce. The circuit judge specifically described the household as being "very fluid" and in "turmoil" as part of his rationale for not returning appellant to that environment. The State asserts, and we agree, that absent a showing that the prosecutor's colloquy with Ms. Reichard about appellant's statement to police had some impact on the circuit court's disposition decision, appellant fails to demonstrate the prejudice requisite to warrant a reversal.

Affirmed.

PITTMAN and HENRY, JJ., agree.